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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

AMERICAN BROADCASTING COMPANY, INC.

No. 118

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NATIONAL BROADCASTING COMPANY, INC.

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

This is a case of first impression in this Court. A plethora of lower court cases have been cited by all parties. But the conflicting doctrines there set forth were adopted against a background of

differing statutes and differing factual situations. These authorities are helpful, but there remains for decision the precise application of a particular federal statute—18 U. S. C. 1304—to the particular ingenious "giveaway" programs covered by the Commission's rules.

It is submitted that both on principle and under the rationale of the better reasoned cases any requirement of consideration for a lottery or similar scheme is fully satisfied in the schemes covered by the Commission's rules.

Appellees' contention that there is no consideration here leads to patent absurdity. As Judge Clark, dissenting below, said (R. 134):

> What they [broadcasters and sponsors] are doing is to purchase time to advertise and vend their wares—indeed the most valuable time conceivable, as is alleged in the papers before us and conceded by all. The time spent by a single listener may be quite brief. But the time spent by the whole country in hanging for an hour more or less breathlessly upon a nationwide broadcast which may (but probably will not) yield the listeners returns ranging from refrigerators, pianos, and trips to South America to good hard cash beyond their wildest dreams provides so stupendous an audience for the advertising message as hardly to be estimated. And I suspect that the time spent by any single listener is almost always considerable. A few fleeting

> moments will not be adequate to learn what the rules are, hear and guess the tune or the answer to the question, and accept and answer the fateful telephonic inquiry. One is just impelled to hear the hour out, and, having gotten the hang of it, to come back the following week, and have the family listen as a part of the game until the announcer calls.

To admit that a radio station and its advertisers obtain something valuable by "buying" an audience, but that the audience collectively has not given anything valuable, merely because its members or some of them did not pay a penny or a box top, is unrealistic in the extreme.[1]

Appellant's opening brief explored in detail the bases for the Commission's interpretation of 18 U. S. C. 1304 here challenged. While we do not agree with appellees' characterizations of

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[1] The same type of unrealistic argument which is urged by appellees here was rejected with respect to a Bank Night scheme in the following colorful language (*Affiliated Enterprises, Inc.* v. *Waller*, 40 Del. 28, 36, 5 A. 2d 257, 260):

"Motion picture theatres are not charitable enterprises. In holding out offers of an award of the kind and in the manner disclosed by the contract, they are not moved by a spirit of brotherly love, sympathy for the poor to the end that they may enjoy a more abundant life, or warmth of heart in any degree. With them it is a coldblooded business device, embraced with hope and expectancy of filling their theatres with paying patrons. They proceed upon the notorious fact that there is nascent in the human breast a gambling instinct; that the average human is avid of an opportunity to gain much at a small risk; and that this instinct and passion is likely to blossom upon slight nourishment."

many of the authorities upon which we relied, or of the additional ones cited by them, we believe that neither time nor reasonable limitation of space permits further discussion of lottery cases generally. The present brief will be confined to a short discussion of certain points stressed by appellees, especially those relating to the Commission's general authority to promulgate rules with respect to the broadcast of lotteries. The Commission's authority to adopt such rules having been unanimously sustained by the court below, and no appeal having been taken by appellees, discussion of this question was deemed unnecessary in our opening brief.

I

THE COMMISSION'S AUTHORITY TO PROMULGATE LOTTERY RULES

The district court held without dissent that the Commission's licensing and rule making powers conferred ample authority to refuse licenses to those who violate 18 U. S. C. 1304 (R. 122–3), and that the exercise of this authority does not constitute censorship in violation of Section 326 of the Communications Act of 1934, as amended, or an interference with the right of free speech guaranteed by the First Amendment, where applied to programs which violate the criminal law (R. 129). Although no appeal has been taken from these rulings, the argument has been renewed by appellees ABC and NBC that Section

326 prohibits any action by the Commission with respect to specific programs (ABC Br. 57–62; NBC Br. 49–53), and that Section 1304 provides no basis for Commission jurisdiction (ABC Br. 61; NBC Br. 53–54). Both arguments are, as the district court held, without merit.

A. THE COMMISSION HAS A DUTY TO CONSIDER VIOLATIONS OF 18 U. S. C. 1304

The argument of appellees NBC (Br. 53–54) and ABC (Br. 61) addressed to the Commission's authority challenges such authority primarily on the ground that there is involved the imposition of a penalty without a criminal conviction. But, as the court below held (R. 131), denial of a license because of continued violations of Section 1304 is clearly not subject to attack as an attempt by the Commission to alter or add to the criminal penalty provided by Congress in that statute. Denial of a license privilege is not a punitive sanction. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223; *Helvering* v. *Mitchell*, 303 U. S. 391; *Steuart & Bros.* v. *Bowles*, 322 U. S. 398, 404–407. And the courts have consistently rejected the curious theory that acts so seriously against public policy as to be declared criminal are, for that reason, immune from the consideration of an agency whose duty it is to grant licenses only to those who will use them in the public interest. *National Broadcasting Company, Inc.* v. *United States*, 319 U. S. 190;

Mansfield Journal Company v. *Federal Communications Commission,* 180 F. 2d 28 (C. A. D. C.). *Cf. Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31.

Cognizance by the Commission of Congressional policy set forth in statutes other than the Communications Act is not only lawful. It is indispensable if the Commission is to carry out its own statutory responsibilities. In determining whether an applicant's proposed or past operation meets the statutory standard of the public interest, convenience or necessity, the Commission has a duty to consider violations of a Federal statute which makes certain conduct by a licensee unlawful. This is especially the case where the particular statute in question does not merely affect broadcasters because they are persons (as, e. g., do statutes against fraud or embezzlement), but is applicable *only* to broadcasting, the very field in which the Commission has been entrusted with the primary regulatory authority.

If the Commission could not take account of violations of 18 U. S. C. 1304 in licensing proceedings, it would be in the position of granting licenses to those who engage in a type of broadcasting forbidden by law; it would, in effect, be required to aid and abet unlawful conduct.

The principle that the Commission may, and must, consider conduct of licensees of a character declared unlawful by Congress, without awaiting

convictions in criminal proceedings, is founded in precedent as well as logic.[2] The general problem of an agency's duties with respect to effectuating Congressional objectives found in other laws is treated in *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31. It was there held that the National Labor Relations Board had erred in ordering reinstatement of employees who had engaged in mutiny, although there had apparently been no prior conviction. The Court stated (p. 47):

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.[3]

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[2] It is too late to argue, in the face of *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508, that due process of law is denied where reviewable administrative action determines the existence of a lottery. This is especially true where the rules will not even be placed in effect until their validity has been passed upon by this Court.

[3] And see *McLean Trucking Company* v. *United States*, 321 U. S. 67.

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That ruling directing the agency to consider an unconvicted violation of the criminal law is applicable *a fortiori* here. For the policies of the Communications Act and Section 1304 present no conflict requiring accommodation.[4] Section 1304 establishes one of the criteria of public interest with respect to broadcasting. The Communications Act provides for the licensing of broadcasters in the public interest.

The decision in *National Broadcasting Company* v. *United States,* 319 U. S. 190, where the Federal Communications Commission's Chain Broadcasting Regulations were sustained, is squarely in point here. The claim was made in that case that the Commission could not consider activities which

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[4] As has been pointed out by the court below (R. 123): "Even though it may not be a function of the Commission to enforce the criminal law, the Commission would have the power to bar any applicant who violated the criminal law. Section 1304 of the United States Criminal Code is so closely identified with the field in which the Commission functions that at one time it was part (§ 316) of the Federal Communications Act. The 'public interest, convenience or necessity' standard for the issuance of licenses to broadcasting companies would imply a requirement that the applicant be law-abiding. Although Congress by a specific enactment authorized the Postmaster General to deny the use of the mails to lotteries and gambling schemes [39 U. S. C. § 259 and § 732; *Public Clearing House* v. *Coyne*, 194 U. S. 497], it was not necessary that Congress specifically authorize the Commission to take action against a broadcasting company which violated Section 1304 of the Criminal Code because the licensing power, specifically conferred on the Commission under Sections 303 and 309 of the Act, would include that authorization."

might constitute unconvicted violations of the antitrust laws since, under Section 311 of the Communications Act as it then read, the Commission was specifically authorized to refuse a license to anyone adjudged guilty of violating the antitrust laws. This Court unequivocally rejected this claim (319 U. S. at 223):

> A licensee charged with practices in contravention of this standard [public interest, convenience or necessity] cannot continue to hold his license *merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted* * * * Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.[5] [Emphasis added.]

Thus even where the statute (Section 311) created specific authority to act upon the basis of a criminal conviction, the Court refused to draw the inference that, absent such a conviction, the Commission was powerless to act. Accord: *Mansfield Journal Company* v. *Federal Communications Commission,* 180 F. 2d 28 (C. A. D. C.); *Mester* v.

[5] That Section 313 of the Communications Act specifically provides that the antitrust laws shall be applicable to radio communications does not distinguish the present situation.

United States, 70 F. Supp. 118 (E. D. N. Y.), aff'd 332 U. S. 749.[6]

The *National Broadcasting Company* and *Southern Steamship Company* cases, *supra,* have established the principle that an administrative agency must, in determining the public interest, consider the policy of other statutes as well as that of the one which it administers. Here the Commission is not purporting to apply or to extend the policy of 18 U. S. C. 1304 in another field; it is merely proposing to deny licenses to those who violate the statute. And to effectuate that licensing policy in a manner that will give full and fair warning to all, the Commission has described certain conduct which it believes to

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[6] In the *Mansfield Journal Company* case, the Court sustained the Commission's denial of broadcast applications where actions taken by the applicant in the conduct of its newspaper business had the purpose of suppressing competition from a radio station and of securing a monopoly of mass advertising and news dissemination.

In the *Mester* case, the Commission had denied an application for transfer of control of Station WOV, where the proposed transferees had been involved in civil proceedings concerning false labeling, fraudulent advertising, and other deceptive practices they had engaged in as partners in the business of marketing edible oils. The Commission found they had manifested a flagrant disregard of government regulations designed for the protection of the public. A three-judge District Court affirmed the Commission's decision, specifically ruling that consideration of the necessary character qualifications of a licensee included consideration of his involvement in such civil litigation.

violate the statute. Under the *National Broadcasting Company* decision, the Commission, pursuant to its duty to consider the public interest, would be warranted in applying the policy of 18 U. S. C. 1304, whether or not the statute had been technically violated. The Commission has stopped short of such action. That the Commission has limited itself by utilizing less than its full policy-making power is hardly a ground for declaring that it has exceeded its powers.

If the Commission could not consider violations of law until they had been adjudicated in criminal proceedings, it would be unable to consider any violation of the Communications Act itself, or its own rules and regulations, since such violations have criminal penalties (Communications Act of 1934, as amended, Sections 501, 502, 47 U. S. C. 501, 502). It is clear that it was intended, as the courts have uniformly held, that conduct of licensees so seriously against public policy as to have been declared unlawful be deemed inconsistent with the public interest, convenience and necessity.

The district court clearly was right in holding that "The 'public interest, convenience or necessity' standard for the issuance of licenses to broadcasting companies would imply a requirement that the applicant be law-abiding" (R. 123).

B. NO CENSORSHIP OR ABRIDGMENT OF FREE SPEECH IS INVOLVED

The argument that the rules constitute forbidden censorship under Section 326 or an abridgment of free speech under the First Amendment is essentially one that the Commission is powerless to refuse a license for the utilization of a scarce channel of interstate communication even if the applicant has regularly violated a valid criminal statute. This argument cannot be sustained. A lottery has long been considered criminal conduct in which the incidental use of speech is not protected by the First Amendment. *Ex parte Jackson,* 96 U. S. 727; *In re Rapier,* 143 U. S. 110; *Lottery case,* 188 U. S. 321; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *Donaldson* v. *Read Magazine,* 333 U. S. 178; *Duncan* v. *United States,* 48 F. 2d 128 (C. A. 9), *cert. den.* 283 U. S. 863.

On the question of speech as conduct, this Court recently said in a unanimous opinion:

> It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But *it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, or written, or printed.* [Emphasis added.] [*Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502.]

Appellees ABC and NBC apparently contend that although no violation of the First Amendment may be involved, any action by the Commission in refusing to renew a license, on the ground that it has been used to commit a crime, is an advance censorship which Congress intended to forbid. But the rules do not provide for any immediate prior restraint of particular programs, nor for the submission of individual programs for Commission approval before they are broadcast by a licensee. Broadcast licensees, acting at their peril, can broadcast any programs they wish, including those which violate the radio obscenity laws (18 U. S. C. 1464), the radio fraud law (18 U. S. C. 1343), the radio lottery law (18 U. S. C. 1304), or other more general criminal statutes. In doing so, the licensee of course risks criminal prosecution, and denial of a license renewal upon the expiration of his present license. This is subsequent responsibility, not prior restraint. *Cf. Near* v. *Minnesota,* 283 U. S. 697.[7]

The rules here set up no arbiter of controlled expression. The only licensing system involved is that provided by the Communications Act itself.

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[7] The inapplicability of the doctrine of *Near* v. *Minnesota* in the similar situations involving denial of use of the mails, and the issuance of cease and desist orders concerning use of instrumentalities of interstate commerce for lotteries, is made clear by *Public Clearing House* v. *Coyne*, 194 U. S. 497, and *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304.

Appellees stop short of asserting at this late date that the licensing system established by the Communications Act is unconstitutional. As an original and highly theoretical proposition, it might be argued that *any* denial of a broadcast license is a "previous restraint" on speech. But this Court has held to the contrary. In *National Broadcasting Company* v. *United States,* 319 U. S. 190, the Court held that radio is a field of scarcity which is subject to reasonable regulations, through licensing, in the public interest. And, with respect to the free speech argument, the Court said (p. 227):

> The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

The censorship provision of Section 326 is plainly inapplicable here. Censorship is the day-to-day control of program content. It is not the denial of scarce broadcast frequencies to those who regularly violate a valid criminal statute. It has been held in every relevant case that the responsibility of the Commission to grant licenses in the public interest embraces a duty to consider the use to which such licenses are put.

In *Johnston Broadcasting Co.* v. *Federal Communications Commission,* 175 F. 2d 351, 359 (C. A. D. C.), the court said:

> As to appellant's contention that the Commission's consideration of the proposed programs was a form of censorship, it is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (*except for prohibitions against obscenity, profanity, etc.*), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship, within the meaning of the statute. [Emphasis added.][8]

The enunciation of the rules and their application involve no exercise of the Commission's personal judgment as to what is "good" or "bad" as in such cases as *Hannegan* v. *Esquire, Inc.,*

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[8] See also *Trinity Methodist Church* v. *Federal Radio Commission,* 62 F. 2d 850 (C. A. D. C.), *cert. den.* 284 U. S. 685; *KFKB Broadcasting Ass'n., Inc.* v. *Federal Radio Commission,* 47 F. 2d 670 (C. A. D. C.); *Independent Broadcasting Co.* v. *Federal Communications Commission,* 193 F. 2d 900, *cert. den.* 344 U. S. 837; *Simmons* v. *Federal Communications Commission,* 169 F. 2d 670 (C. A. D. C.); *cert. den.* 335 U. S. 846; *Bay State Beacon, Inc.* v. *Federal Communications Commission,* 171 F. 2d 826 (C. A. D. C.)

327 U. S. 146.[9] And *cf. Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, and *Superior Films, Inc.* v. *Department of Education*, — U. S. —, 22 U. S. Law Week 3193 (1954). The standard here has been set by Congress. There is thus no question presented as to the extent to which programming not declared illegal by Congress may constitute a reason for denial of a license on the basis of the Commission's judgment as to quality. The only question is whether the Commission may validly establish a policy that a misuse of licensed facilities so flagrant as to constitute a criminal act under an established standard will be considered sufficient reason to warrant a finding that a further license will not be in the public interest. We believe the answer to be clearly in the affirmative.

II

THE LEGALITY OF THE RULES

A. THE RULES ARE RESTED UPON 18 U. S. C. 1304 IN ITS ENTIRETY

The claim of appellee CBS (Br. 11–12, 39–40) that the validity of the rules must be determined only upon the basis of whether they correctly set forth the elements of a "lottery", as distinguished from "similar scheme, offering prizes dependent

[9] The *Esquire* decision does not suggest that if the Postmaster General had found that the magazine advertised a lottery, he would have been powerless to carry out his statutory duty to bar it from the mails. Cf. *Public Clearing House* v. *Coyne*, 194 U. S. 497.

in whole or in part upon lot or chance", is clearly a makeshift. The rules themselves (R. 169–170) repeat in *haec verba* in paragraph (a) the entire statutory language of "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance," and provide that a program will be considered to come within that language if the elements set forth in paragraph (b) of the rules are present.

The intent of the Commission to utilize Section 1304 in its entirety is thus clear from the four corners of the rules. And the Report and Order adopting them not only failed to state, as appellee CBS argues (Br. 11), that their validity was to be determined upon the basis of less than the full language of Section 1304 but, on the contrary, stated in the first paragraph (R. 161):

> These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest.[10]

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[10] Other references to the purpose of the rules and the schemes covered by them at R. 164 and 167 in the Report and Order similarly repeat the full language of 18 U. S. C. 1304.

and further stated with respect to the exact point now raised by CBS (R. 167, footnote):

> We believe that in any event the types of schemes covered by our interpretative rules are within the scope of the statute, whether it be narrowly read in terms of the requisites for lotteries, or *whether it be more broadly read.* [Emphasis added.]

There is thus no basis for any argument that the Commission intended to, or did, reject reliance upon the full scope of 18 U. S. C. 1304. Both the rules themselves and the Report and Order make clear the Commission's position that the schemes covered by the rules are either lotteries or similar schemes, whether the statute be narrowly or broadly read.

B. 18 U. S. C. 1304 IS CONSTITUTIONAL AS INTERPRETED IN THE RULES

Appellee CBS urges that if the programs here involved are covered by 18 U. S. C. 1304, the statute itself is unconstitutional under the Fifth Amendment (Br. 37–39). The argument rests upon the assumption that the give-away schemes are beneficent rather than evil, and the elementary principle that Congress must act rationally in imposing prohibitions. If the programs at issue are covered by the statute (and for the purposes of this discussion appellee CBC assumes that they are) it is because they have the essential elements of lotteries and other similar schemes thought by Congress to be evil. Give-away

schemes permit the exploitation of the cupidity of radio and television audiences for the profit of the promoters of the schemes through the lure of prizes distributed by chance. A rational legislature no doubt could sanction such schemes.[11] But this does not mean that a legislature which condemned such schemes would be irrational.

Appellee CBS is really urging merely that its judgment as to what is evil should be substituted for that of Congress. Appellee CBS evidently seeks adoption of the discredited view that laws violate due process unless their objectives are affirmatively established as desirable to the satisfaction of the Court. This Court, however, has demonstrated its unwillingness to assume the function of weighing for itself what is an evil and what is not in the field of business regulation. As the Court said in *Carolene Products Co.* v. *United States,* 323 U. S. 18, 31:[12]

> When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat.

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[11] Apparently the legislature of Wisconsin has done so ABC Br. 46).

[12] And see cases there cited. See also *Rast* v. *Van Deman & Lewis,* 240 U. S. 342, 364–366 as to the severe limitations upon the judicial function in deciding whether a legislature properly thought a scheme similar to a lottery was or was not evil.

Appellee CBS also urges that the validity of the Commission's rules is open to attack because the Commission did not, on its own, find that the schemes involved are evil or tend to demoralize the public.[13] We find the argument difficult to follow. It is a novel suggestion that an otherwise valid interpretation of a statute must be buttressed by such findings of fact by an administrative agency. The Commission here has not purported to originate a policy for the conduct of broadcast licensees, based upon an evil found by the Commission. It has merely stated that it will deny licenses to those who regularly flaunt a *Congressional* policy formally embodied in a valid criminal statute specifically applicable to broadcast licensees. It would have been superfluous, if not presumptuous, for the Commission to have made a finding that it agreed with Congress that lotteries, gift enterprises and other similar schemes are evil.

C. THE POST OFFICE DEPARTMENT HAS NOT ADOPTED A MONETARY TEST OF LOTTERY CONSIDERATION

Appellees uniformly attach considerable weight to the position of the Post Office Department,

[13] In the district court, CBS went so far as to argue that 18 U. S. C. 1304 is only constitutional because directed at schemes which "are evil and tend to impoverish and pauperize the public." (CBS Br. 41; cf. ABC Br. in this Court, p. 36). This contention has apparently now been modified, but even as modified it represents an inadmissible attempt artificially to restrict the plenary authority of Congress over interstate commerce.

which for many years has had the responsibility of administering the postal anti-lottery statutes (CBS Br. 35; NBC Br. 45; ABC Br. 50). And appellees apparently suggest that the Post Office Department has taken a position basically contrary to that of the Commission. This contention is based upon Post Office approval of three programs, "Mu$ico", "Stop the Music" and "Truth or Consequences."

Each of these Post Office rulings was made without elucidation or discussion of the Department's views on consideration as they might pertain to those individual instances. The reasons for the rulings are necessarily highly speculative. With respect to "Mu$ico", the Post Office had actually issued prior conflicting interpretations and merely stated in the letter relied upon that *if* the program were again submitted it was *likely* that it would not be held to conflict with the postal lottery laws under the new regulations which were issued in 1947 (R. 229). In the case of "Truth or Consequences", a charitable fund raising campaign was involved, a fact which may have played a considerable part in the decision of the Solicitor of the Post Office that matter relating to the plan would be accepted for mailing (R. 24–25). In the case of "Stop the Music", the only connection of the scheme with use of the mails was the sending of postcards by persons who desired to become eligible to participate. It may well have been the view of the Post Office that sending postcards

from which the lists of persons who would later be called on the telephone were compiled did not involve an existing lottery. See later decision in *United States* v. *Halseth,* 342 U. S. 277. In fact, the Solicitor's letter specifically stated that the program was one concerned primarily with the use of television and radio facilities, and that the question of whether its operation was in conflict with 18 U. S. C. 1304 was a matter for determination by the Commission (R. 27).

To be contrasted with the cryptic rulings above referred to, are the most recent Postal Bulletin on the subject, and the Post Office Department's position in the *Garden City* case. None of the appellees directs its attention to the Postal Bulletin quoted at page 76 of our principal brief, in which the Office of the Solicitor has reiterated the position of the Post Office Department that monetary consideration is not necessary, and that the expenditure of substantial effort or time will suffice. This basic ruling is in direct conflict with the position of appellees in this case. This is made clear by the position taken by the Post Office Department in *Garden City Chamber of Commerce* v. *Wagner,* 100 F. Supp. 769, and the statement in the Postal Bulletin that the Department's position is modified only as required by the *Garden City* case and the decision here on appeal.[14] The

[14] Thus the Bulletin (Appellant's Br. 77) states that in view of the *Garden City* case and the decision below: "* * * this office must reverse its rulings which have held considera-

position of the Post Office Department with respect to the nature of consideration furnishes no support to appellees.

III

THE APPLICATION OF THE RULES

Appellees seek to discredit the rules by positing extreme situations in which, it is urged, their application would be absurd.[15] Thus appellee ABC suggests that an educational FM station in Boston, which customarily reproduces fine music and educational programs, might find its license in jeopardy if a breakfast food company should employ the facilities of the station to put on a music quiz which might require or induce listening to the Boston Symphony.

The hypothetical example chosen is not merely extreme; it is impossible of occurrence. The

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tion to be present in the following and similar situations: where the sole requirement for participation is registration at a store and, in addition, attendance at a drawing or a return to the store to learn if one's name was drawn; visiting a number of stores, or a number of different locations in a store, to ascertain whether or not one's name or number has been posted; witnessing a demonstration of an appliance or taking a demonstration ride in an automobile, etc."

[15] It is easy to conjure up hypothetical cases which cast doubt upon the reasonableness of any statute or rule of general application. But the validity of a rule or statute is not to be determined upon the basis of possible applications not at issue in the controversy before the Court. See *United States* v. *Sullivan*, 332 U. S. 689; *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Lemieux* v. *Young, Trustee*, 211 U. S. 489.

station referred to is a non-commercial educational FM station (station WGBH) licensed to an educational foundation. Its license does not authorize it to transmit sponsored or commercial programs.[16] Moreover, the rules at issue were designed to apply to commercial radio and television stations which are authorized to support themselves by the sale of time to sponsors. The entire analysis of the consideration question in the Commission's Report and Order makes clear that it was considering the benefit to commercial stations and their advertisers from increased audiences obtained with lottery bait (R. 168–169). Finally it must be observed that appellee ABC's concern here is not for any interest of its own, or that of the appellees. None of the appellees is licensee of a non-profit educational station, or eligible to become one.[17]

For its purportedly absurd example, appellee NBC refers to WNYC, the New York City municipally owned station which is licensed as a regular AM station[18] but actually operates on a non-commercial basis (Br. 34). Appellee NBC apparently considers that WNYC should be permitted to conduct give-away programs because

[16] Section 3.503 (c) of the Commission's Rules and Regulations, 47 CFR 3.503 (c).

[17] Sections 3.503 (a) and 3.621 (a) of the Commission's Rules and Regulations, 47 CFR 3.503 (a); 47 CFR, 1952 Supp., 3.621 (a), as amended, 18 F. R. 252.

[18] The Board of Education of New York City also operates an FM educational station.

there would be no profit to it. We think it clear that if WNYC should hold a *sponsored* give-away program, from which it and the sponsor actually would profit, the mere fact that the station is publicly owned would not and should not exempt it from the Commission's rules. There is no statutory exemption for government operated lotteries. On the other hand, in the rather unlikely event that WNYC should simply embark on a program of giving away public (or contributed) funds without any possible return to it, such activity might well be held to be outside the intendment of the rules.

Appellee CBS argues (Br. 43) that the rationale of the rules breaks down when applied to sustaining programs. Except for particular kinds of sustaining programs which, by their nature, are generally considered inappropriate for commercial sponsorship, it may fairly be said that most such programs are carried with a view toward maintaining or increasing the station's regular listening audience, *i. e.,* its circulation, and with a further view toward eventual use of the program by a sponsor. The size of a station's audience is the saleable commodity which it has to offer. The Commission's Report and Order took official notice of this fact (R. 168), the majority below recognized it (R. 125), and it has nowhere been disputed by any of the appellees. There is no suggestion by any of the appellees

that its "give-away" programs have been intended to be carried on a permanent sustaining basis. It is therefore not correct to assume that bringing a sustaining program of a commercial station within the rules is in any way inconsistent with the stated theory upon which the rules were adopted.

Appellees also suggest that the rules are irrational or unduly harsh in contemplating denial of a license merely because of broadcast of lotteries. Thus appellee ABC urges (Br. 54–56) that the Commission improperly has isolated a single factor in announcing that licenses will not be granted to those who regularly violate 18 U. S. C. 1304. This amounts to a contention that it is unreasonable to refuse a license to one who makes a practice of committing a crime through the operation of facilities licensed only for use in the public interest.

The rules do *not* provide that a license will be denied regardless "of how trivial or how unintentional the violations may be" (ABC Br. 54). They do provide that a license will be denied where the licensee makes a "policy or practice"

of violating the statute.[19] Moreover, a license will be denied only after opportunity for hearing. And judicial review of any such decision is of course available. Communications Act of 1934, Section 309, 47 U. S. C. 309, Denial in such circumstances is both reasonable and lawful. See *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223.

[19] The approach taken by the Commission with respect to the violation of statutes other than the Communications Act (Docket No. 9572, see ABC Br. 54–56), *i. e.* that no policy of absolute disqualification would be adopted in advance, concerned primarily possible violations of statutes not directly or solely relating to the actual use of broadcast facilities. It would obviously be impractical to decide in advance by rule making the weight to be given violations of each of the other statutes of the United States. In the instant case the Commission was dealing with a statute specifically applicable to broadcasting over licensed facilities by those entrusted to use such facilities only in the public interest.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief for appellant, the judgment of the district court should be reversed insofar as it enjoins enforcement of portions of the Commission's rules. The cases should be remanded to that court with directions to dismiss the complaints.

Respectfully submitted.

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